1815. March 10th.

THE TOWN OF PAWLET v. DANIEL CLARK, AND OTHERS.

Absent....TODD, *J.*

This Court has jurisdiction, where one party claims land under a grant from the state of New Hampshire, and the other under a grant from the state of Vermont, although at the time of the first grant, Vermont was part of New Hampshire.

A grant of a tract of land in equal shares to 63 persons, to be divided amongst them into 68 equal shares, with a specific appropriation of 5 shares, conveys only a sixty-eighth part to each person. If one of the shares be declared to be, "for a glebe "for the "church of "England as "by law es- "tablished," that share is not holden in trust by the grantees, nor is it a condition annexed to their rights or shares. The church of England is not

THIS was a case certified from the Circuit Court for the district of Vermont, in which, upon an action of ejectment brought by the town of Pawlet to recover possession of the *glebe lot*, as it was called, in that town, the opinions of the judges of that Court were opposed upon the question whether judgment should be rendered for the Plaintiff or for the Defendants, upon a verdict found, subject to the opinion of the Court, upon the following case stated:

"In this cause it is agreed on the part of the Plain- "tiffs, that the lands, demanded in the Plaintiffs' decla- "ration, are a part of the right of land granted, in the "charter of the town of *Pawlet*, by the former governor "of the province of New Hampshire, as *a glebe for the* "*church of England as by law established*; and that in "the year 1802 there was, in the town of Pawlet, a so- "ciety of Episcopalians duly organized agreeably to "the rules and regulations of that denomination of "Christians heretofore commonly known and called by "the name of the church of England. That in the "same year the said society contracted with the reverend "Bethuel Chittenden, a regular ordained minister of "the Episcopal church, who then resided in Shelburn, "in the county of Chittenden, (but had not any settle- "ment as a clerk or pastor therein) to preach to the "said society in the town of Pawlet at certain stated "times, and to receive the avails of the lands in ques- "tion, and that the said Chittenden thereupon gave a "lease of the said land to Daniel Clark and others, "who went into possession of the premises, and still "holds the same under the said lease, and that the said "Chittenden regularly preached and administered the "ordinances to the people of the said society, according "to his said contract, and received the rents and pro- "fits of the said land until the year of our Lord Christ

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"1809, when the said Chittenden deceased; and that in "1809 the said society contracted with the revd. Abra- "ham Brownson, a regular ordained minister of the "Episcopal church, residing in Manchester, and offi- "ciating there a part of the time, to preach to the said "society, a certain share of the time, and to receive the "rents and profits of the said land; and that the said "Brownson has regularly attended to his duty in the "said church, and administered ordinances in the same "until September, 1811, about which time the said so- "ciety regularly settled the revd. Stephen Jewett, who "now resides in the said town of Pawlet, and who from "the time of his settlement is to receive all the tempo- "ralities of the said church. And it is further agreed "by the said parties, that the general assembly of the "state of Vermont on the 5th of November, 1805, did "grant to the several towns in this state, in which they "respectively lie (reference being had to the act of the "general assembly aforesaid) all the lands granted by "the king of Great Britain to the Episcopalian church "by law established (reference being had to the charter "of the town of Pawlet aforesaid for the said grant of "the king of Great Britain) and that the lands, in the "Plaintiffs' declaration mentioned and described, are "part of the lands so granted, by the king of Great "Britain, to the Episcopalian church."

a body corporate, and cannot receive a donation of nomine.

A grant to the church of such a place is good at common law and vests there fee in the parson and his successors. If such a grant be made by the crown it cannot be resumed by the crown at its pleasure.

Land at common law may be granted to pious uses before there is a grantee in existence competent to take it, and in the mean time the fee will be in abeyance.

Such a grant cannot be resumed at the pleasure of the crown.

The common law, so far as it related to the erection of churches of the Episcopal persuasion of England, the right to present or collate to such churches, and the corporate capacity of the persons thereof to take in

The charter of Pawlet is dated the 26th of August, 1761, and purports to be a grant from the king, issued by Benning Wentworth, governor of New Hampshire, and has these words; "Know ye, that we, of our spe- "cial grace," &c. "have, upon the conditions and re- "servations herein after made, given and granted, and "by these presents for us, our heirs and successors, do "give and grant, in equal shares, unto our loving sub- "jects, inhabitants of our said province of New Hamp- "shire, and our other governments, and to their heirs "and assigns forever, whose names are entered on this "grant, to be divided amongst them into sixty-eight "equal shares, all that tract or parcel of land situate, "lying, and being within our said province of New "Hampshire, containing by admeasurement 23,040 "acres, which tract is to contain six miles square and "no more." &c. "and that the same be and hereby is "incorporated into a township by the name of *Pawlet*,"

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succession, was recognized and adopted in New Hampshire. It belonged exclusively to the crown to erect the church, in each town, that should be entitled to take the glebe, and upon such erection to collate through the governor, a parson to the benefice. A voluntary society of Episcopalians within a town, unauthorized by the crown, could not entitle themselves to the glebe. Where no such church was duly erected by the crown, the glebe remained as an hæreditas jacens, and the state which succeeded to the rights of the crown, might, with the assent of the town, alien or incumber it; or might erect an Episcopalian church therein, and collate, either directly or through the vote of the

&c. "To have and to hold the tract of land as above expressed, together with all," &c. "to them and their respective heirs and assigns forever," &c.

On the back of which grant were indorsed, "The names of the grantees of Pawlet, viz: Jonathan Willard," and others, being in all 62, then follow these words, "His excellency Benning Wentworth, esquire, a tract of land to contain five hundred acres as marked in the plan B. W. which is to be accounted two of the within shares—one whole share for the incorporated society for the propogation of the gospel in foreign parts; one share for a glebe for the church of England as by law established; one share for the first settled minister of the gospel; one share for the benefit of a school in said town."

The act of the *5th of November*, 1805, is entitled, "An act directing the appropriation of the lands in this state, heretofore granted by the government of Great Britain to the church of England as by law established."

"Whereas the several glebe rights granted by the British government to the church of England as by their law established, are in the nature of public reservations, and as such became vested by the revolution in the sovereignty of this state; therefore,

"*Sect.* 1. Be it enacted by the general assembly of the state of Vermont, that the several rights of land in this state granted under the authority of the British government to the church of England as by law established, be and the same are hereby granted severally to the respective towns in which such lands lie, and to their respective use and uses forever, in manner following, to wit:

"It shall be the duty of the selectmen in the respective towns in the name and behalf, and at the expense, of such towns, if necessary, to sue for and recover the possession of such lands, and the same to lease out according to their best judgment and discretion, reserving an annual rent therefor, which shall be paid into the treasury of such town, and appropriated to

"the use of schools therein, and shall be applied in the "same manner, as monies arising from school lands are, "by law, directed to be applied."

This cause was argued at last term by PITKIN, and WEBSTER, *for the Plaintiffs*, and by SHEPHERD, *for the Defendants.*

PITKIN, *for the Plaintiffs.*

On the part of the Plaintiffs it is contended, that the share in question, or the sixty-eighth part of the town of Pawlet, which in the charter was granted or reserved "for a glebe, for the church of England, as by law established," did not at the time of the grant pass from the king, for want of proper persons to take; that it remained in the grantor until the revolution, when it passed over and vested in the state of Vermont, who had, therefore, full right to dispose of it. By the words of the charter, the tract of land therein described is to be divided among those whose names are entered on the charter *into 68 equal shares.* The names of 63 persons are mentioned, including Benning Wentworth, who has two shares, making for those 63 persons 64 shares, leaving four shares; one of which is for the incorporated society for the propogation of the gospel in foreign parts; one *for a glebe for the church of England as by law established*; one one for the first settled minister of the gospel; and one for schools: making in the whole 68 shares.

It is clear, from the terms of the grant, that no person named on the back of the charter, or intended as grantee, except B. Wentworth, can take but one share, as the town is to be divided into 68 *shares, and those shares are to be equal.* B. Wentworth is to have 500 acres, which are particularly designated and marked in the plan annexed to the charter, and are to be accounted two shares. This exception also proves that the other grantees are to have one share only. In no event, therefore, could the share in question, or the two other public shares, as they have been called, be divided among the individual persons named. Nor has this ever been the case. In the division of the town of Pawlet the share intended for a glebe, was located by itself, and called *the glebe lot.* It was intended, in the grant, as a name; and if it could not pass as *designated*, for

town indirectly, its parson, who would thereby become seized of the glebe jure ecclesiæ, and be a corporation capable of transmitting the inheritance.

By the revolution, the state of Vermont succeeded to all the rights of the crown to the unappropriated, as well as appropriated glebes. By the statute of Vermont of 30th Oct. 1794, the respective towns became entitled to the property of the glebes thereof situated.

A legislative grant cannot be repealed.

No Episcopal church in Vermont can be entitled to the glebe, unless it was duly erected by the crown before the revolution, or by the state since.

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want of proper grantees, it remained in the king, the grantor, (as if one half of the names inserted had been fictitious) and at the revolution vested in the state of Vermont.

The nature of the estate intended to be conveyed, is expressed in the word "*glebe*" well known in the English law, as a provision for the parson of a parish. The law says that the freehold only vests in the regular parson; not the fee: consequently the grant or disposition of land, in such case, for a glebe, does not make or imply a disposition of the fee; the fee, therefore, remains in the grantor.

The words "for *a glebe for the church of England as by law established*," express clearly the intention of the grant, viz: for the support and extension of the national church, considered in its political connexion. It is not a grant to the national church as a body. No such grant ever was made, or if made, would be valid. Every provision for its support is to some *organ* of the church. as to the bishop of such a see, or the parson of such a parish, and his successors. A parish church, in the English law, is the building consecrated and endowed. There must be a glebe, which may be the church yard only. The parson has, in the glebe, no more than a freehold estate. He is considered in law as a sole corporation, and the freehold passes by succession. Parishes are a civil and ecclesiastical division; the inhabitants of a parish, the parishioners, the members of the national church, are never said to be members of the parish church; neither the parishioners nor the vestry have any *right* in, or *power* over the glebe, not even during a vacancy, (*See* 1 *Black. page* 417.) The church of England never was established by law, either in New Hampshire or Vermont, before or since the revolution. Neither the civil nor ecclesiastical law, as applicable to glebes, was known or recognized at the date of the charter; nor has it been adopted or recognized since in either of those states. The intention of the grant, therefore, even before the revolution, could never have been carried into effect. It is also well known that, at the date of the charter, the land therein granted was a wilderness, and so continued for a long time afterwards.

At the time of the grant, therefore, there was not only no church of England established by law, but in the town of Pawlet there was no organ of that or any other church, capable of taking the share in question.

The grant, of course, could not take effect; and the revolution has rendered it utterly impossible that it ever can take effect agreeably to the intention of the donor. By the revolution we have become completely severed from the church of England as by law established. Individuals and societies may possess the same land, have the same mode of worship, and the same ordinances administered in the same manner, and submit to the same discipline, as far as may be effected without the assistance of the civil arm. But this constitutes, in the view we are now taking of the subject, *similarity*, not *identity*. It furnishes no ground for legal derivation of civil or legal connexion. In every political, civil and legal view, and in all the civil and legal consequences, the dissolution of the church of England, as by law established, was in the United States as total and complete on the revolution, as that of the civil power of the British government. Nor has there ever been in the state of Vermont, a substitute adopted. Every idea of a national or state religion has been exploded. The Court will consider how many things are requisite to the legal possession and enjoyment *of a glebe*; how much of the common law of England, and how much of the cannon law must be adopted or considered as in force; although, in every civil and political view, the institution or establishment to which they applied is abolished. There must be a parish, a church with cure, *a parson*, legally and canonically introduced—four things are requisite to constitute a parson; 1. *Holy orders*: 2. *Presentation* or *Collation*; 3. *Institution*; 4. *Induction*; he must be a sole corporation. No part of the common law on this subject has been adopted in the state of Vermont; either by the constitution, by statute, or by legal adjudications.

It would be absurd to consider any number of Episcopalians, formed into a society in Vermont, as standing in the place of a parish, and capable, contrary to the doctrine of the common law under which they must derive, of succeeding to the freehold of a glebe, or of taking and

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holding by succession or otherwise, by or under a grant of lands for a glebe, made by the king of Great Britain before the revolution. There is a statute in Vermont, (*see an act for the support of the gospel, passed in* 1797, *Revised Laws, Vol.* 2, *page* 474) under which religious societies may be formed; but it does not appear, in the case, that the society in the town of Pawlet is formed under that act. But, if so formed, the members of such society are not confined to any particular limits, and if associated from 4 or 5 different towns, they may have a claim equally good to the glebe lands, in each town. This statute, which extends equally to all denominations of Christians, constitutes societies or associations formed under it, corporations or *quasi* corporations; and enacts, "That they shall have power to hold to "themselves and successors, all such estates and inte- "rests, as they may *hereafter* acquire, by purchase or "otherwise, and the same to sell and transfer, for the "benefit of such association." A society so formed, has the precise power given by the act and no other. The power is limited to *future acquisitions*; the power to sell is co-extensive with the power of acquisition. Nothing is to be holden which shall be perpetually appropriated, as a glebe is. Such society is not empowered to succeed to estates, rights or interests, granted previous to their existence, although limited to objects similar to its own. Indeed the expression in the act seems to have intended an exclusion of such claim.

If the share in question should be considered as a *reservation* for a future particular use, it then remained in the king, the donor, until a state of things should arise, when it could be applied to such use. This use is specified in the charter, viz: for a glebe, &c. We have before proved that, prior to the revolution, it had not been, and could not, consistently with the institutions of the country be so applied. It, of course, remained in the king at the revolution, and at that time vested in the state of Vermont.

At the date of this charter a separation of the provinces or colonies from the mother country was not contemplated. It was undoubtedly intended at that time, by the donor, that the church of England should be established by law in the province of New Hampshire, as

it had been in some of the other provinces, and particularly in Virginia. In this charter, therefore, as well as in all other charters, granted by the governor of New Hampshire, provision was made, by a reservation of a certain share of every township, for such an establishment.

If the share in question be considered, in the nature of a grant, then, as we have before stated, the grant of "a glebe," if it took effect at all, is of the freehold only, and not of the fee; of the freehold to be taken and held by the incumbents in succession.

The fee, of course, not being granted, remained in the grantor. By the English law, as well as our own, on the dissolution or political death of a corporation, all estates granted to such corporation revert to the grantor or donor. And if a grant was made by the king to any person, or number of persons, incapable of taking or holding, or if the object ceased to exist, *or never came into existence*, the estate was considered as never having passed, or as reverting to the king, according to the nature of the case.

On the revolution the state of Vermont, as a sovereign state, succeeded, in full and sovereign right, to all the property and rights of property within the same, which, at the time, were vested in or appertained to the king of Great Britain, whether in possession or reversion. The case, then, stands thus: a tract of land in the town of Pawlet was, by the king of Great Britain, before the revolution granted "for a glebe for the "church of England, as by law established;" that is, *the freehold to vest to a particular use*, when *that use should arise*, the remainder or reversion in the crown. There is no securing, in the constitution of Vermont, to any man or body of men, of any rights or benefits, which under the crown were intended for the church of England as by law established. At the time of the revolution there had never been, within the territory, now state, of Vermont, *a regular parson*, who could make any possible legal claim or pretence to the use of any of the glebe lands within the same. The sole corporation, as the parson was denominated, was not dissolved or extinguished by a political death, because in Vermont it

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never came into existence, but the possibility of such existence ceased. A provision might have been made by the constitution, or by statute, in favor of Episcopalians; but it must have operated as a new grant, or new organization. No such provision has been made; the right, therefore, vested in the state of Vermont, and the grant is well made to the town of Pawlet.

SHEPHERD, *contra.*

It is contended by the counsel for the Plaintiff that nothing passed by the grant contained in the charter of Pawlet; so as to divest the king of Great Britain of the title to the premises in question. If this position is correct, it must be admitted that the Plaintiff is entitled to recover; because it cannot be denied that the title of the crown to any lands antecedent to the revolution, within the jurisdiction of the now state of Vermont, would of course become the property of the state. If, however, the ground taken by the Plaintiff's counsel, shall be found untenable, and that the title of the king was divested by the grant; then, whether the Defendants have a title or not, will be a matter of indifference; so long as the Plaintiffs must recover on the strength of their own title, and not on the weakness of ours.

If, by the grant, the title passed from the then king, the state of Vermont could acquire no right by the revolution; but the title must remain, unless forfeited, as at the time of the grant.

The reason given by the counsel for the Plaintiff to show that, notwithstanding the charter, the title remained in the grantor is, that when made, there was no grantee in *esse* capable of taking the fee, or other estate, so as to divest the king of his. If this be true, on a fair construction of the letters patent, it must also be admitted that the Plaintiff is entitled to judgment.

It is believed that, on examination of the charter, the Court will be of opinion that there was a sufficient grantee in *esse*; and that the title did pass by that instrument. And if there was then, no matter what has

happened since, unless there has been a forfeiture, and office found, which are not pretended.

1. The words of the granting clause are, "*Do give "and grant in equal shares, unto our loving subjects, in- "habitants of New Hampshire, and our other governments, "and to their heirs and assigns forever, whose names are "entered on this grant, to be divided to and amongst them, "into sixty-eight equal shares, all that tract, or parcel of "land, &c.*" describing and bounding the whole township of Pawlet.

It is contended here that the whole of the land, contained within the boundary lines of the township, was designed to be granted without any saving or reservation to the crown, of any part of the same. The whole of the six miles square was granted; to whom? To the loving subjects of his *majesty* in New Hampshire and elsewhere. How was it granted? In fee simple; and in sixty-eight equal shares, to be equally divided to, and amongst the king's loving subjects named on the grant.

He granted to them (be they more or less in number) the whole township of Pawlet as tenants in common, and not in severalty. Hence, each man named on the grant became entitled to his proportionable part of the whole township, whether he was one of sixty-eight, or one of three.

It is presumed the Court in this case will be much inclined to do, as Courts have generally done, if possible by their construction to satisfy the object of the grant, and give it a meaning which was intended by the grantor. It is a rule of construction to search out the intention, and make that a land mark.

Possessing liberal views of this instrument, it will no doubt be found that the grantor designed to pass the title to the whole town of Pawlet; to his loving subjects named thereon, and not to confine the grant to a sixty-eighth part of the township to each, but in proportion to the whole number, more or less.

Now, supposing that a part of the names written on

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the grant should have been fictitious, the grant of a proportion would not have been to them, but directly to the others, who answer the description given, "Loving subjects of the grantor."

Fictitious persons could not be loving subjects; therefore the whole land would pass to the real persons. Most unquestionably the whole tract was granted to those capable of taking a title.

It will be seen by the grant, that the lands were not allotted, of course no partition was made amongst the patentees until after the charter was made. The grant was in common and not in severalty; therefore no inference of an intention to give each proprietor but a single share can be drawn from the circumstance of the whole town being required to be divided into sixty-eight equal shares. As well might the counsel contend that it was inferrable from a law incorporating a bank with three thousand shares that the stockholders could have but one share each.

If the foregoing is a correct construction of the instrument before the Court, then it results as a certain inference that the crown had not a rood of land remaining in Pawlet; and, consequently, the state of Vermont could have none; as the state pretends to no greater right or title than that of the king.

2. It will be attempted to be shown that on the 26th day of August, 1761, there was in *esse* a church of England, as by law established, which could be a grantee of the crown. If so, the title passed directly to the church in fee simple; and would need no auxiliary to sustain her right.

It is said by the counsel that lands granted for the benefit of the church, are granted to the bishop, or some other ecclesiastical person; but it would be strange doctrine to say that the king had not power to grant directly to the church established by law, and therefore distinctly identified as a Christian society. The position will here be ventured, that such a grant to the church of England as by law established was, and still is valid.

To maintain the point that the church existed at the date of the grant, we need only appeal to historical facts in the English books, and the still more authentic testimony of the body of the English law, the statutes and adjudged cases of the realm, within the recollection, and familiar to the mind of the Court.

It is said "that when the grant was made there was no church in Pawlet; it was all new. There was no established church in New Hampshire or New York." Whether true or not, as it respects this part of the argument, is not worth enquiry; for it will be remembered that the words of the grant do not confine the bounty of the sovereign to Pawlet, New Hampshire, or the American continent: it is co-extensive with his dominions, and may be claimed by the church wherever found within them.

That there was a church established by law in Great Britain no-one will deny: if so, what should prevent that church from being the grantee? It can hardly be denied that the king could grant lands lying in one of his American colonies to his subjects beyond the Atlantic, as effectually as those who resided in that colony. It was all within his territorial jurisdiction; and place of residence could have no influence. It may be said that the grant is to the king's subjects in New Hampshire. True; but the words "*and our other governments*," are added. These words may embrace the whole governments and dominions of his majesty.

If, however, this ground should fail us there can be no difficulty, it is presumed, to ascertain the existence of a church in the colonies capable of taking a title to the property in question.

In Virginia, if information is correct, the Episcopalian church was established by a law of that colony before the date of the grant; but whether so or not, we feel indifferent because by a future construction of the grant, we have the utmost confidence that the true meaning is not a church established by any law in the American colonies, but that the words "*as by law established*," are used as descriptive of the denomination of Christians, intended as the subjects of royal munificence.

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As much as to say that sect of Protestants who are known in England as the established Episcopalian church. That you, churchmen of America, must embrace the same creed; the same church government must be the rule of your discipline; and your ordinances must be administered in every respect as by the established church in England. You must be neither Catholics nor Desenters, but be identified in every part of your religious establishment in faith and practice with the mother church.

That this is a natural construction is manifest from the fact that the government could not have been ignorant of the state of the church in the colonies, and it would be the height of absurdity to suppose a grant to be made to a body of Christians, which the grantor well knew did not exist. The Court surely will never impute to the officers of any government such trifling and mockery. If, therefore, the colonial Episcopal church was intended as the subject of this bounty, and if she was not established by law, it must follow, as an irresistable inference that the words "*as by law established,*" are words of description and not of identity.

Having established this point, we will show by historical proof a church in the state of New Hampshire, long antecedent to the date of the grant.

In *Belknap's hist. of New Hampshire, 2 vol.* 118, it is stated that in the year 1732, a building for an Episcopal church was erected at Portsmouth, in New Hampshire. In 1734 the church was consecrated; and in 1736 they obtained a clergyman of that order by the name of Arthur Browne.

If this church was capable of taking a title to land, as I shall hereafter show, all the difficulty suggested on the part of the Plaintiff will be removed.

Some reasons will now be given to show that such a church as was established in New Hampshire was capable of taking a title to real property.

1. The king, by the act of granting, creates sufficient corporate powers, to carry into effect his designs. That

he can create corporations cannot be doubted. He did, by the very instrument before the Court, create in the town of Pawlet all the corporate powers and prerogatives which they now possess; a body sufficiently known in law to be invested with the supposed legal estate in the premises in question; and by an act of the very legislature who have authorized them to bring this action. If the king had the authority to incorporate, it can be easily and legally inferred from the grant that this body was sufficiently incorporated thereby.

Should congress, by law, give to the Presbyterian church of the city of Washington a portion of the public lands, would the Court endure to be told that there was no proof of the incorporation of the church, *ergo* the law was void—the title never passed either by the law or grant made in pursuance thereof?

In a case thus situated, the Court may, indeed they ought to infer, for it is a just legal deduction, and bottomed upon the soundest judgment of law, that a sovereign, granting power, (always supposed, *prima facie* at least, to be right) had not indulged in the foolish blunders, of granting real property for most desirable ends, to shadows and *non entities*. And it is confidently believed that the Court will determine as a reasonable and legal intendment, that the church of *New Hampshire* was made capable of holding this property.

There is a further reason to suppose the church capable of taking a title. The grant being a governmental act, and of such high and incontrovertible authority, every statement and fact contained in it is so far proved that it cannot be denied. If this be correct, the grant itself proves the whole that need be proved to make this part of the grant valid, and to vest the title in the church. The Court, therefore, will not receive any statements, history, conjectures, or Vermont preambles, to contradict the acts of the British government made in solemn and official form. It is true that a prior grant from the same authority may be shown to defeat a subsequent. But that is permitted for very different reasons; because the first act of a government, granting away its lands, vests a title in the grantee, and there is nothing left to give.

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In support of this position it is submitted, whether the words "*one share as a glebe for the church of England, &c.*" are not tantamount to a positive averment of an existing church in this country which could be the legal subject of donation by letters patent. There is this strong reason to support such an opinion, that we never can impute ignorance or error to a sovereign while exercising the high prerogatives of his station. We never can say that he, as the organ of the government, has been granting land without a grantee; that he has mistaken the facts or the law, and consequently nullify his acts. It is enough that the instrument points to the grantee and gives the object; its legal attributes are to be presumed.

The Plaintiff comes, claiming under the very title granted to us; in which grant we are acknowledged to have a prior right. Had this grant been from other than the government on whom the doctrine of estoppel cannot fasten, it would be enough for us to hold up the charter between the claim and our possession and shut the Plaintiff at once from even a view of the Court. Even now, whether the doctrine of estoppel will apply or not, one thing is true—that what the king, under whom the Plaintiff claims, has solemnly recognized as correct must be binding upon the government of Vermont, and, consequently, upon the Plaintiff in this cause.

The act of the British government is not the only governmental act which the church has to secure their possession.

The legislature of Vermont on the 26th day of October, 1787, passed an act "*to authorize the selectmen in the several towns of the state to improve the glebe lands, &c.*" And, after enacting that the selectmen should have power to lease out the *glebe lands*, receive the rents, bring actions of ejectment, recover the possession thereof, when possessed by persons without right, they make a proviso in the words following: "*Provided nevertheless, that nothing contained in this act shall extend so far as to prevent any Episcopal minister, during the time of their ministry*, that now are or hereafter may be in possession of *any glebe lot or right, or actually officia-*

"ting in said town where the land lies, and who is an or-
"dained minister of the Episcopalian church, from having
"the management of said lots, and the avails arising
"therefrom."

By this proviso it is perfectly obvious that the legislature intended to manifest a legal recognition of the right of the church to the property.

It is also equally obvious that by the act authorizing the selectmen to take care of the glebe lots, and obtain possession by action of ejectment of those which were possessed by squatters, the legislature designed not to filch away the land from the church, and in the plenitude of their power to forget right, but to secure the title and promote the interests of the church. If not, why in the proviso are the Episcopal clergy preferred to other clergy in the management of the lands; and why are they preferred even to the selectmen as the guardians of the property. The proviso is high and indisputable proof that the object of the statute was solely to preserve the property from waste for the benefit of the church, to preserve for it the income which might result from its prudent management, and to save the title from loss by long adverse possession.

After all this, one would suppose that the state would never indulge itself in attempting to divest the church of their property; yet, strange as it may appear, on the 30th of October, 179[illegible], the legislature of Vermont make another act concerning the glebe lots, and the following is its preamble:

"Whereas, by the first principles of our government
"it is contemplated that all religious sects and denomi-
"nations of Christians, whose religious tenets are con-
"sistent with allegiance to the constitution and govern-
"ment of this state, should receive equal protection and
"patronage from the civil power: And whereas, it is
"contemplated in the grants heretofore made by the
"British government, commonly called *glebe rights*, that
"the uses of the said rights should be to the sole and
"exclusive purpose of building up the national religion
"of a government diverse from and inconsistent with
"the rights of our own; for which reason and on the

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"principles of the revolution, the property of said lands "is vested in this state." They, therefore, go on to enact that the rents and profits of all the *glebe lots* shall be appropriated to the support of religious worship in their respective towns forever; without regard to the sect of Christians, and all should share alike, according to the number of taxable inhabitants, in the parishes respectively.

In this preamble they seem to admit that the title to the glebe lots was vested in the church. They do not deny such a construction of the grant, nor do they urge, as a reason for taking away the property from the Episcopalians, that the grant was void, or that the title was in the crown before the revolution; and that thereby they became intitled to the property; but they say these lots were granted "exclusively to build up a national religion of a government diverse from and inconsistent with the rights of their government;" and for these reasons they attempt to divest the church of their title in order to give the property, or the income of it, to other sects of Christians.

The reason given for enacting this law is strong evidence of the opinion of the legislature, that the title had passed out of the crown and vested in the church. But as they disliked an established religion, supposed it anti-republican, and what was more to be dreaded, it was established in a government "diverse from the government of Vermont," and inconsistent with their rights, or rather their religious and political opinions;—being disagreeable in these particulars they take away the income of the land from the Episcopalians to appropriate it to other and, no doubt as they supposed, better purposes.

Notwithstanding the length and force of this preamble, and the cogent reasons given for making the law, on the fifth day of November, 1799, the legislature repeal this act; and in so doing most manifestly abandon all pretentions to the church property; for in the repealing law they take care to secure those, who have trespassed upon those lands, from actions which might be brought for so trespassing:—admitting in the fullest sense that men who had intermeddled with the property

by the authority and in pursuance of their law had so trespassed. Hence the Court will see that the legislature, both in the making and in the repealing of the law of 1794, show that the act was an unjust attempt at usurpation.

By the record of the case of *Pettibone v. Barber*, tried before the late justice Patterson at a Vermont circuit, it appears that the Plaintiff failed in an action brought in pursuance of this law. It is said that the judge pronounced the law unconstitutional and void. This decision might have induced the repeal, as the trial was had in the intermediate time between the passage and repeal of the act.

The legislature in the year 1805 passed another act; and by that discover less solicitude for the Christian church in any form. This, too, has a preamble, contradicting in its terms the old, in which they say, "Whereas, the several glebe rights, granted by the "British government to the church of England as by "law established," are in "the nature of public reser- "vations," they, therefore, give them to the selectmen of the towns where they lie respectively, for the use of schools, &c.

The first act contains by implication a decided confirmation of the title in the church. The second, although contradictory in its provisions and repugnant to that right, exhibits in a striking light in its preamble and in the repealing clause, a thorough conviction, in the mind of the legislature, of the fallacy of their pretentions, urging facts which, if true, would contribute nothing in support of those pretensions. In the last they urge a new reason for their law, and, as we suppose, equally unsound. Here they become wiser, and not only act the legislators but judges, scout what had been done by their predecessors, and give a construction of the grant which is indeed a strange one, but which, if correct, is supposed, as will be hereafter shewn, to defeat the right to recover in this case.

3. In the third place it is supposed the grant of the crown may be considered valid by adopting the opinion that this is one of the cases where the fee may be in *abey-*

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ance, until the existence of the church in the town of Pawlet, so organized as to be capable of receiving it.

To maintain this point the Court are referred to 2 *Blac. Com.* 106, *Co. Lit.* 342, where it is laid down, that an estate may be granted to John for life, and then to the heirs of Richard, although Richard has no heirs at the time of the grant.

Here, although the life estate vests in John immediately, yet the fee must be in *abeyance*, until the heirs of Richard are *in esse*. Indeed the happening of the event is perfectly contingent, for those in remainder may never exist. Should it be said that the fee remains in the grantor during the life estate, ready to vest in the heirs of Richard if they exist at the determination of the life estate, or to continue in him by *reverter* if Richard has no heirs; it is met by urging that if this doctrine be correct; then with equal propriety may it be contended on our part, that the fee remained in the king ready to vest, whenever there should be a church.

But says the state of Vermont, "we have a right by forfeiture to the king's property." True, but no greater right than the king had; which was a naked legal title; the use belonged elsewhere. Of this hereafter.

In the 2 *Black. Com.* 318, it is said that ecclesiastical estates must sometimes necessarily be in *abeyance*, and that where there is no person in whom the fee can vest, it potentially exists in *abeyance*; as between the death of the incumbent and the next presentation.

The parson having but a life estate in the glebe, unless it could so exist on his death, it must revert to the grantor.

Christian, in his notes on Blackstone, supposes the fee to be all the while in the lord of the manor.

This is by no means the opinion of Blackstone, or of the still greater lawyer, Coke; both of whom, if they are correctly understood, lay down the law to be, that the fee exists, between the death of the parson, and his successor, not in the lord, but in *abeyance*.

4. If the construction of the patent contended for in the inception of this argument is correct, there will be no difficulty in finding a *grantee*, to uphold the fee, and make it subservient to the benevolent intentions of the crown. It would not be a violent or unnatural construction to say that the town of Pawlet was granted to the persons named on the grant, in fee, upon condition that they should, in the location of the town, lay out and set apart "*one share as a glebe for the church of England, &c.*" together with the other shares for Benning Wentworth, the first settled minister, and the school, according to the directions indorsed.

Under such a construction, whether the church were incorporated or not, they might reap the benefit of the use; for as soon as they become organized, and a clergyman settled, they would be capable of receiving the income of the land.

This construction was adopted by the proprietors of the town. In locating the same they did survey a share and mark it off as a *glebe* right. This appears from the several acts of the state and in the argument of the counsel for the Plaintiff.

The present inhabitants of the town must all hold their lands under the grant before us, and not only so but from the original proprietors who so located and consecrated the glebe right which is now claimed by those persons.

By the laws of England, and probably of all civilized countries, the claimor or possessor of land is bound by the acts and confessions of those under whom he holds the claim or possession. By this rule then the present inhabitants of Pawlet are bound by the act of their predecessors. That act was a complete recognition of the right of the church to the property; an act which spoke louder than any language.

It may be said that the share was located by the proprietors of the town in their corporate capacity. If that was the case it is still the worse for them, because a corporation never dies, and the location was the act of the Plaintiff upon the record in this cause: and they are now

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claiming property which they once voluntarily admitted to belong to the church.

Again, it appears, that the Plaintiff in this cause is now enjoying the benefits of this construction in the share given to a school and the first minister settled in the town. Without this, or the third position taken in this argument, the town would have but slender pretences to the use of those two shares; but it seems they claim those two lots by the same, or a more uncertain title, hold them by the same tenure, derive the right from the same source, and yet claim the *glebe* also, and in order to support that claim are driven to the necessity of denying the legal and efficient properties of the instrument by which they, as well as the church claim.

5. This is a trust estate. The patentees named upon the grant are the trustees for the use of the church whenever it should be organized in the town of Pawlet, so as to be enabled to receive the rents of the land.

If a use can result from a grant by implication, it is supposed this is a case of that kind.

In expectation that objections will be made to such an interpretation of the case those objections are endeavoured to be answered.

1. It may be said that the grant is silent as to any use or trust and therefore it is not to be implied.

The answer is, wherever from the nature of the grant, a trust estate can be implied, with propriety, where it is necessary to carry into effect the object of letters patent, the Court will adopt the implication.

The Court are referred to *7 Bac. Ab. new ed.* 89, *Sand. on uses*, 208, for the doctrine, of the implication of uses. In *12 Mod. 162. Jones v. Moxley*, it is said that a use may be declared without the word *use*. Any words that shew the meaning of the party are sufficient. If the Court can suppose that the legal estate was granted in fee, to the patentees, there can be no difficulty in deciding the nature of their title. The instrument, upon

which such legal estate depends, will indubitably shew that their only right was for the use of the church.

2. It may be said that as there is no church in existence, the legal estate must fail for the want of a use.

It has already been shewn that a church was in *esse*, when the grant was made and whether the church was or was not incorporated, cannot be material; in either case the title in the trustee would be valid. To this point the Court are desired to look at 1 *Rep.* 23, 24 and 25, and *Gilb. laws cases*, 44, where it will be found that public institutions are capable of enjoying a trust, and it was decided that the poor of the parish of Dale, although not incorporated, were capable of a trust. Without adopting the principle that the church can take an equitable interest in these premises, there would in many cases be an end to the workings of benevolence. Science might often lose her patrons; the needy their benefactors, and religion her warmest supporters.

Before we part with this point we will once more look at the act of 1805, upon which the Plaintiff founds his right to recover; and to its preamble, which declares the glebe lands in the nature of public reservations. If this means any thing, it must mean that the legal estate was reserved to the crown. As a proof that the legislature so meant, observe the following language, "*and as such "by the revolution became vested in the sovereignty of this "state.*" Now, sovereign as the state may be, she can have no other or greater title than the crown of Great Britain had after the grant and before the revolution, and that right could be no more than a right reserved for the use of the church; because it never ought to be supposed that the crown made this grant with no other design than to reserve to itself, what it before had. If the king had an inclination to retain for his own use a few shares of the land, he might have done it directly; in the same manner as the pine trees were reserved for his royal navy.

This then is the right of the state of Vermont, on their own construction, a right to do what, by the act of 1787, the legislature did, like honest men, and added security to the already existing title of the church.

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If the right of the crown was of the nature described, and if the Court can suppose the land reserved to the crown, and that the *king could be a trustee*, they will then say that the state of Vermont could take no estate to the exclusion of the equitable right of the *cestui qui trust*, but any forfeiture of the king or any act of his, could only prejudice his own rights, and not the rights of third innocent parties. This doctrine will be found in 1 *Blk. Rep.* 123, *Burges v. Wheat. Sand. on uses* 152—3, *also* 252, 257.

If therefore the construction of the legislature of Vermont should be adopted, it would only help the Plaintiff to be defeated in this action; for it cannot be believed that the use as well as the legal estate could be reserved by the grant before the Court.

WEBSTER, *in reply.*

1. It is said to be the obvious intention of the grantor to pass, by the grant, all the territory of Pawlet, without any saving or reservation. But this is against the express words of the grant. The grant is made, "upon the conditions and *reservations* hereafter made;" nor is there any thing in the grant, to which the term "reservation" can be properly applied, except it be the public rights, as they are usually called, of which the part appropriated for a glebe, &c. is one.

The Defendants counsel further supposes, that although the territory was to be divided into sixty-eight equal parts, yet this was not to designate the proportion which each grantee was to receive; but that if any person, named in the grant, should not accept, or not be capable of taking, or not happen to be a person *in esse*, or in other such case, then the whole tract would be to be divided among the residue. This is believed not to be a sound construction of the words of the grant. Those words are, "do give and grant in equal shares "unto our loving subjects, &c. whose names are entered "on this grant, to be divided amongst them into sixty-"eight equal shares, all that tract," &c. To what purpose was the tract to be divided into sixty-eight equal shares, if it were not to ascertain what portion each grantee should have?

But what is conclusive on this point, is, the disposition made of B. Wentworth's right. He was to be entitled to two shares. These are actually severed from the common mass, by the grant itself, and marked out on the land This shews, that the share of each proprietor was not thought liable to be encreased, by any incapacity in others to take, or other such cause.

A great part of the states of New Hampshire and Vermont were granted by charters, issued in the name of the crown, by the provincial governors of New Hampshire, which, charters were *in all respects like this.* These charters or grants have received a settled construction, which has been followed by long usage, in both states. No case is known to have existed, in which any grantee has claimed a greater portion of the whole land, than his name bore to the names on the charter, including the public right; nor has any severance or partition been made, in any case, upon any other rule or principle. To divide the land into sixty-eight equal parts, and then adopt the plan of appropriating the whole to a less number of owners, as, in the example supposed by the Defendants counsel, to three, giving each twenty sixty-eighth parts, and two thirds of one sixty-eighth part more, would be to act without object or motive. Such therefore has never been supposed to have been the course contemplated in the grant. The division or partition of lands holden under these charters has been, as is believed, in every instance, by dividing the whole into as many parts, commonly called rights, as there were individuals named on the charter, together with the public rights, and allowing two parts to B. Wentworth. The shares allotted to the public rights, are usually designated as the "school right," "minister right," "society right," and "glebe right," respectively. These hav never been claimed by the original proprietors. In New Hampshire (where the Plaintiff's counsel is better acquainted with judicial proceedings and judicial history than in Vermont) no legislative provision is recollected to have been made. The first settled minister has usually possessed the right designated for him. The town corporations, bodies totally distinct from the original proprietors, and owing their corporate existence, in all cases, to their charters, or to acts of the legislature (for although this charter

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undertakes to erect a corporation, yet, in fact, no corporation ever existed, or was erected by these grants) have had the management and disposition of the school right. The statutes of the state make it the duty of the towns, in their corporate character, to make provision for the support of free schools, within the town, and under the management of the town authority. These school rights having been originally intended to aid in the support of schools, it has been holden, that the law, throwing the duty of this support on the town, has given them the disposition of this fund for that purpose. There being no manner of privity between the town corporations and the original grantees of the soil, the former can derive no title to these school rights, but from the law of the state. That they have right to them has been settled by many decisions, followed by uniform practice.

The grant to the society for propogating the gospel presented a different case. That was a corporation, then existing, and still existing in England, capable by its charter, of holding lands; and doubtless entitled, *originally*, to take the portion intended for it in this grant. Whether this society was not so far connected with the national church and the *realm* of England, as that its rights were divested by the revolution, has never been decided. Actions are pending, both in the Circuit and State Courts, n which this society is party, in relation to these lands.

The glebe right has generally, in point of fact, been occupied or disposed of by the town. No individual has been able to maintain a right to one of these lots, or portions, upon his ecclesiastical character. It has been holden, on the contrary, that the grant, so far as it undertook to give one sixty-eighth part for a glebe, was void, for want of a grantee. The Plaintiff's counsel have been obligingly favored, by the present chief justice of New Hampshire, with notes of the case of *Mead v. Kidder*, in the Supreme Court of that state in 1806; in which Court the same judge then precided. To which case this Court is respectfully referred.

Whether the better construction is, that there is a *reservation*, of these lands, by charter, pointing out

merely the future use, or, that a grant was intended, which cannot take effect, for want of a grantee, is immaterial in this case. The result is the same.

2. The Defendant contends that there was a church of England, as by law established, capable of taking. On this point, the Plaintiff's counsel will only remark,

1. That no grant to the church of England, *eo nomine*, could avail, even in England, to pass the fee. Would such a grant enure to the see of Canterbury, or the diocese of London? The church of England, in the aggregate, is not a corporation, but one of the estates of the realm.

2. But the grant is limited by the words of the charter itself, to the church of England, as by law established, *in the town of Pawlet*. Just as the school right is to be for the support of schools in that town, and the right of the minister, first to be settled there. It is hardly necessary to draw into the argument even the obvious intent of the grantor. The words themselves are unequivocal: and does not the Defendant himself rest his title upon his connexion with the Episcopal society in Pawlet?

As to the laws of Vermont, before 1805, they all show, that the legislature acted on the opinion, that it might dispose of these lands, as public property, in any way it thought proper. It was a question of expediency and propriety; and provision is made, in some of the laws, allowing Episcopal clergymen, already in possession, to remain seven years.

With respect to the opinion ascribed to a late judge of this Court, it need only be remarked, that if the cause turned on the point supposed, (which does not appear at all from the record) it was but the opinion of an able judge; formed and pronounced instantly, in the course of a jury trial, without case reserved, or solemn argument; and it is no disrespect to say, possibly without a knowledge of all circumstances, or a full view of all consequences.

3. The Defendants contend, that the fee may have

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passed out of the king, and yet not vested any where, but remained in abeyance. But the text of Blackstone, which he cites, does not bear him out. The estate in abeyance, in the case put by Blackstone, is a fee, remaining after a freehold has been granted and vested. With respect to the freehold of a glebe, after the death of the parson and before the naming of a successor, both Fearne and Christian maintain the contrary of Blackstone's opinion—but that is not at all this case. To meet this case, the Defendants must shew, that if a grant be made to a person not *in esse*, the land nevertheless passes out of the grantor, and remains in abeyance until, in the course of events, some person arises into being, who answers the description in the grant.

4. The observations already made are deemed a sufficient reply to the remarks of the Defendants counsel under this head.

5. It is not supposed possible to give in to the opinion, that this is a *trust estate*, granted to the individuals named in the charter. The idea is wholly novel. Not a syllable in the grant itself intimates any such thing. All is the other way. How can it be imagined, that the intention was to convey an estate in trust to a large number of individuals, who were to be, at first, tenants in common—then, to divide and hold in severalty—and whose estates, by law, would descend, in *gavel-kind*, to their heirs? Was B. Wentworth to be a trustee, whose estate was severed by the charter itself? Was the corporation in England to be one of the trustees? It is hardly necessary to add that the Court would not very willingly construe this grant so as to raise a trust, which from the nature of the case *never could be executed*.

This, then, is a case, in which the highest Courts of both states have concurred in giving to the grant in question a practicable and beneficial construction; under which very many estates, are holden, and the Court would not incline to disturb these titles, but for irresistible reasons. It must be remembered, that there are two hundred townships, granted by charters precisely like this. In the whole, there are not probably more than a dozen associations of Episcopalians. If the Court should decide, that the legislatures may not dispose of

these lands, what shall be done with them, in towns where there are no Episcopal societi s to claim them? Are they to remain, without owners or rightful occupants, till such changes in religious opinions shall take place, as that there shall be an Episcopal society in each town.

If this case is to be considered, not as a reservation, but a grant; and if this grant is not void for want of a grantee; then, it must, of necessity, receive this construction; i. e. that it was in fact a grant for the use of such ministry, or such religious purposes, as the *town* should choose, or the state appoint; at least, unless the church of England should have been established by law. The *general* purpose was religious instruction. This duty the laws of the state throw on the *towns*, and it is a reasonable construction which gives this fund, even without any particular grant of the legislature, to the towns, for that purpose. This construction will answer the *general* object of the grant. In no other way can any of its objects be answered, in one case out of fifty. This puts it on the same ground as the grants for *schools* and *for the use of the ministry*, (a common grant in the charters in the eastern part of New Hampshire.) The main purposes of the grants were *education*, and *religious instruction*—and, in the events which have happened, the most safe, and only practicable, construction is to give the funds intended for the promotion of these purposes, to those on whom the law imposes the obligation of making adequate provision for these objects. I venture to say such is the *law* of New Hampshire.

There is still another question, to which the Plaintiff's counsel wishes to draw the attention of the Court; and that is, has the Court jurisdiction of the cause? Is this a case coming within that clause of the constitution which gives to this Court jurisdiction over "controversies between citizens of the same state, claiming lands "by grants of different states?" It is submitted, with some confidence, that this is not such a case. These two grants are not to be considered as the acts of *different* states, in the sense of the constitution. At the time of the first grant, both the present states of New Hampshire and Vermont formed but one state. They have become two, by subsequent sub-division. The first grant

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was made by the state of Vermont, as much as by the state of New Hampshire. The power from which it emanated was the sovereign power of what is now Vermont, precisely as much as it was the sovereign power of what is now New Hampshire. The question is, between an act of the sovereign power of what is now Vermont, passed in 1761, and another act of the sovereign power of Vermont, passed in 1805. If, on the division of territory, that part lying west of Connecticut river had been called New Hampshire, and the part lying east of that river Vermont, instead of the reverse; it seems to the Plaintiff's counsel, that in that case, the whole ground on which the jurisdiction of the Court over this case rests, would have been removed.

It is easy to perceive the class of cases, for which this provision was made; for example, when disputes about boundaries between two states arise. It is easy also to imagine many other cases, apparently within the letter, and yet not within the meaning, and so excluded by a just construction of the clause. These cases arise from the sub-division of states. One may imagine, for example, that in the state of Kentucky, ejectments must be often tried, in which grants of Virginia before the division, and grants of Kentucky since, *might* be respectively relied on by the parties; and yet it would hardly be contended that that circumstance should oust the Courts of Kentucky of their jurisdiction, and give the cognizance of all such causes to the Courts of the United States. It might be said, in such case, that the grants emanated from different states; and, nominally, they did so. Still they both originated from a power having undoubted authority to grant the territory. The first grant was not so much the act of a different state, as of the *parent* of both states. Virginia, *now*, differs as much from *Virginia*, before the severance, as Kentucky now differs from Virginia before the severance. Kentucky has the same power over her territory *now*, as Virginia had, over the *same* territory formerly. She is therefore, as to this, to be considered the same sovereign power, in other words the same state. If *integrity of territory*—or retention of jurisdiction over the whole of the same soil is necessary to preserve the identity of political power, then Virginia herself *is* not what she *was*, a grant of hers *before* the severance, and a grant *since*, would be grants from different states.

SHEPHERD, *in reply. as to Jurisdiction.*

The counsel for the Defendants in answer to the objection made to the jurisdiction of the Court will only say, that this case is certainly within the literal provision of the constitution and it is presumed the Court will not search with solicitude to find a far-fetched meaning in repugnance to the letter so long as it can produce no other object than to send the parties to a trial in the Courts of Vermont, where perhaps there is not a judge to be found but is interested for or against the Plaintiff, in this cause.

This is a case where the lands in dispute have been granted by different states; that is, by New Hampshire and Vermont.

Now, although these states were all under one jurisdiction, yet when the land was granted by the state of Vermont, they were two sovereign, independent states, and the same reason exists here, that can exist in any case of state controversy, for depriving the states respectively of the power to determine the dispute.

If this cause is to be tried in Vermont, the judges are to decide under the very strong impressions of a legislative construction, unequivocally made, of the grant; and to give us what we claim as right, they must decide against a positive statute of their legislature. So far therefore is this case from being taken from the letter of the constitution, by any equitable construction with a view to set up the spirit against the letter, that it is within all the reasoning that governed the framers of the constitution, and most perfectly within the meaning of that clause; and one of the evils, which must have been intended to be guarded against, exists, at *full length*, in the present case.

Why was the case of parties claiming land under the grants of different states made cognizable before the United States' Courts? undoubtedly because where this state of things exists it is reasonable to suppose that the judges of the states respectively will feel strong prepossessions and are therefore unfit to decide the strife in relation to the powers and rights of the conflicting states.

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It is the same reason which induced the giving jurisdiction in several other cases, such as citizens of different states; and a state and citizens of another state. In these cases the state Courts may be deprived of their jurisdiction; and why? Most indubitably because the the judges of the Courts of the United States have less interest, and fewer prejudices to overcome, and the parties will be more sure of an impartial decision. And can this reason exist stronger in any case than in the one now before the Court?

*March 10th.--Absent....*TODD, *J.*

STORY, *J.* delivered the opinion of the Court as follows;

The first question presented in this case is, whether the Court has jurisdiction. The Plaintiffs claim under a grant from the state of Vermont, and the Defendants claim under a grant from the state of New Hampshire, made at the time when the latter state comprehended the whole territory of the former state. The constitution of the United States, among other things, extends the judicial power of the United States to controversies "between citizens of the same state claiming lands un-"der grants of different states." It is argued that the grant under which the Defendants claim is not a grant of a different state within the meaning of the constitution, because Vermont, at the time of its emanation was not a distinct government, but was included in the same sovereignty as New Hampshire.

But it seems to us that there is nothing in this objection. The constitution intended to secure an impartial tribunal for the decision of causes arising from the grants of different states; and it supposed that a state tribunal might not stand indifferent in a controversy where the claims of its own sovereign were in conflict with those of another sovereign. It had no reference whatsoever to the antecedent situation of the territory, whether included in one sovereignty or another. It simply regarded the fact whether grants arose under the same or under different states. Now it is very clear that although the territory of Vermont was once a part of New Hampshire, yet the state of Vermont, in its

sovereign capacity, is not, and never was the same as the state of New Hampshire. The grant of the Plaintiffs emanated purely and exclusively from the sovereignty of Vermont; that of the Defendants purely and exclusively from the sovereignty of New Hampshire. The sovereign power of New Hampshire remains the same although it has lost a part of its territory; that of Vermont never existed until its territory was separated from the jurisdiction of New Hampshire. The circumstance that a part of the territory or population was once under a common sovereign no more makes the states the same, than the circumstance that a part of the members of one corporation constitutes a component part of another corporation, makes the corporation the same. Nor can it be affirmed, in any correct sense, that the grants are of the same state; for the grant *of the Defendants* could not have been made by the state of Vermont, since that state had not at that time any legal existence; and the grant of the Plaintiffs could not have been made by New Hampshire, since, at that time, New Hampshire had no jurisdiction or sovereign existence by the name of Vermont. The case is, therefore, equally within the letter and spirit of the clause of the constitution. It would, indeed, have been a sufficient answer to the objection, that the constitution and laws of the United States, by the admission of Vermont into the union as a distinct government, had decided that it was a different state from that of New Hampshire.

The other question which has been argued is not without difficulty. It is contended by the Plaintiffs that the original grant, in the charter of Pawlet, of "one "share for a glebe for the church of England as by law "established," is either void for want of a grantee, or if it could take effect at all, it was as a public reservation, which, upon the revolution, devolved upon the state of Vermont.

The material words of the royal charter of 1761 are, "do give and grant in equal shares unto our loving sub-"jects. &c. their heirs and assigns forever, whose names "are entered on this grant, to be divided amongst them "into sixty-eight equal shares, all that tract or parcel "of land, &c. and that the same be and hereby is incor-

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"porated into a township by the name of Pawlet; and "the inhabitants that do or shall hereafter inhabit the "said township, are hereby declared to be infranchised "with and entitled to all and every the privileges and "immunities that other towns within our province by "law exercise and enjoy. To have and to hold the "tract of land, &c. to them and their respective heirs "and assigns forever, upon the following conditions," &c.

Upon the charter are endorsed the names of *sixty-two* persons, and then follows this additional clause: "His excellency, Benning Wentworth, a tract of land "to contain 500 acres as marked in the plan B. W. "which is to be accounted two shares; one share for "the incorporated society for the propagation of the "gospel in foreign parts; one share for a glebe for the "church of England as by law established; one share "for the first settled minister of the gospel; one share "for the benefit of a school in said town." Thus making up, with the preceding sixty two shares, the whole number of sixty-eight shares stated in the charter.

Before we proceed to the principal points in controversy, it will be proper to dispose of those which more immediately respect the legal construction of the language of the charter. And in our judgment, upon the true construction of that instrument, none of the grantees, saving governor Wentworth, could legally take more than one single share, or a sixty-eighth part of the township. This construction is conformable to the letter and obvious intent of the grant, and, as far as we have any knowledge, has been uniformly adopted in New Hampshire. It is not for this Court upon light grounds or ingenious and artificial reasoning to disturb a construction which has obtained so ancient a sanction, and has settled so many titles, even if it were at first somewhat doubtful. But it is not in itself doubtful; for it is the only construction which will give full effect to all the words of the charter. Upon any other, the words "in equal shares," and "to be divided amongst them in sixty-eight equal shares," would be nugatory or senseless. We are further of opinion that the share for a glebe is not vested in the other grantees having a capacity to take; and so in the nature of a condition,

use, or trust, attaching to the grant. It is no where stated to be a condition binding upon such proprietors, although other conditions are expressly specified. Nor is it a trust or use growing out of the sixty-eighth part granted to the respective proprietors, for it is exclusive of these shares by the very terms of the charter. The grant is in the same clause with that to the society for the propagation of the gospel, and in the same language, and ought, therefore, to receive the same construction, unless repugnant to the context, or manifestly requiring a different one. It is very clear that the society for the propagation of the gospel take a legal, and not a merely equitable estate; and there would be no repugnancy to the context, in considering the glebe, in whomsoever it may be held to vest, as a legal estate.

We are further of opinion that the three shares in the charter "for a glebe," "for the first settled minister," and "for a school," are to be read in connexion, so as to include in each the words "in the said town," i. e. of Pawlet; so that the whole clause is to be construed, one share for a glebe, &c. *in the town of Pawlet*, one share for the first settled minister *in the town of Pawlet*, and one share for a school *in the town of Pawlet.*

We will now consider what is the legal operation of such a grant at the common law; and how far it is affected by the laws of New Hampshire or Vermont.

At common law the church of England, in its aggregate description, is not deemed a corporation. It is indeed one of the great estates of the realm; but is no more, on that account, a corporation, than the nobility in their collective capacity. The phrase, "the church of England," so familiar in our laws and judical treatises, is nothing more than a compendious expression for the religious establishment of the realm, considered in the aggregate under the superintendance of its spiritual head. In this sense the church of England is said to have peculiar rights and privileges, not as a corporation, but as an ecclesiastical institution under the patronage of the state. In this sense it is used in magna charta, ch. 1, where it is declared "*quod ecclesia angli-*"*cana libera sit, et habeat omnia jura sua integra, et li-*

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"bertates suas illæsas;" and lord Coke, in his commentary on the text, obviously so understands it, 2 *Inst.* 2, 3. The argument, therefore, that supposes a donation to "the church of England," in its collective capacity, to be good, cannot be supported, for no such corporate body exists even in legal contemplation.

But it has been supposed that the "church of England of a particular parish," must be a corporation for certain purposes, although incapable of asserting its rights and powers, except by its parson regularly inducted. And in this respect it might be likened to certain other aggregate corporations acknowledged in law, whose component members are civilly dead, and whose rights may be effectually vindicated through their established head, though during a vacancy of the headship they remain inert; such are the common law corporations of abbot and convent, and prior and monks of a priory. Nor is this supposition without the countenance of authority.

The expression, parish church, has various significations. It is applied sometimes to a select body of Christians forming a local spiritual association; and sometimes to the building in which the public worship of the inhabitants of a parish is celebrated; but the true legal notion of a parochial church is a consecrated place, having attached to it the rights of burial and the administration of the sacraments. *Com. Dig. Esglise, C. Seld. de Decim.* 265. 2 *Inst.* 363. 1 *Burn's Eccles. law,* 217. 1 *Woodes,* 314. Doctor Gibson, indeed, holds that the church in consideration of law is properly the cure of souls, and the right of tithes. *Gibs.* 189. 1 *Burn's Eccles. law,* 232.

Every such church, of common right, ought to have a *manse and glebe* as a suitable endowment; and without such endowment it cannot be consecrated; and until consecration it has no legal existence as a church. *Com. Dig. Dismes, B.* 2. 3 *Inst.* 203. *Gibs.* 190. 1 *Burn's Eccl. law,* 233. *Com. Dig. Esglise, A. Dort. of Plural,* 80 When a church has thus acquired all the ecclesiastical rights, it becomes in the language of law a rectory or parsonage, which consists of a glebe, tithes and oblations established for the maintenance of a par-

son or rector to have cure of souls within the parish. *Com. Dig. Ecclesiast. persons, (C. 6.)*

These capacities, attributes and rights, however, in order to possess a legal entity, and much more to be susceptible of a legal perpetuity, must be invested in some natural or corporate body; for in no other way can they be exercised or vindicated. And so is the opinion of lord Coke in 3 *Inst.* 201, 202, where he says, "albeit they" (i. e. subjects) "might build churches "without the king's license, yet they could not erect a "spiritual politic body to continue in succession and "capable of endowment without the king's license; but "by the common law before the statute of Mortmain "they might have endowed the spiritual body once in- "corporated *perpetuis futuris temporibus*, without any li- "cense from the king or any other."

This passage points clearly to the necessity of a spiritual corporation to uphold the rectorial rights. We shall presently see whether the parish church, after consecration, was deemed in legal intendment such a corporation. In his learned treatise on tenures, lord chief baron Gilbert informs us that anciently, according to the superstition of the age, *abbots* and *prelates* "were "supposed to be married to the church, in as much as "the *right of property was vested in the church*, the es- "tate being appropriated, and the bishop and abbot as "husbands and *representatives of the church had the right* "*of possession* in them; and this the rather because they "might maintain actions and recover, and hold Courts "within their manors and precincts as the entire own- "ers; and that crowns and temporal states might have "no reversions of interests in their feuds and donations. "Therefore, since they had the *possession in fee*, they "might alien in fee; but they could not alien more than "the right of possession that was in them, for the right "of propriety was *in the church*." But as to a parochial parson, "because the cure of souls was only com- "mitted to him during life, he was not capable of a fee, "and, therefore, the fee was in abeyance." *Gilb. Tenures*, 110, &c.

Conformable herewith is the doctrine of Bracton, who observes that an assize *juris utrum* would not lie

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in cases of a gift of lands to cathedral and conventual churches, though given in *liberam eleemosynam*, because they were not given *to the church solely*, but also to a parson to be held as a barony, *non solum dantur ecclesiis, sed et personis tenentiæ in baronia;* and, therefore, they might have all the legal remedies applicable to a fee. But he says it is otherwise to a person claiming land in right of his church, for in cases of parochial churches, *gifts were not considered as made to the parson, but to the church, quia ecclesiis parochialibus non fit donatio personæ, sed ecclesiæ, secundum perpendi poterit per modum donationis. Bracton*, 286, *b.* 1 *Reeves Hist. law*, 369. And in another place, Bracton, speaking of the modes of acquiring property, declares that a donation may well be made to cathedrals, convents, parish churches and religious personages, *poterit etiam donatio fieri in liberam eleemosynam, sicut ecclesiis cathedralibus, conventualibus, parochialibus, vivis religiosis*, &c. *Bracton*, 27, *b.* 1 *Reeve Hist. law*, 303.

The language of these passages would seem to consider cathedral, conventual, and parochial churches as corporations of themselves, capable of holding lands. But upon an attentive examination it will be found to be no more than an abreviated designation of the nature, quality and tenure of different ecclesiastical inheritances, and that the real spiritual corporations, which are tacitly referred to, are the spiritual heads of the particular church, viz. the bishop, the abbot, and, as more important to the present purpose, the parson, *qui gerit personam ecclesiæ.*

Upon this ground it has been held in the year books, 11 *H.* 4, 84, *b*, and has been cited as good law by Fitzherbert and Brook. (*Fitz: Feofft. pl.* 42.—*Bro. Estate pl.* 49. *S. C. Viner, ab. L. pl.* 4.) that if a grant be made to the church of such a place, it shall be a fee in the parson and his successors. *Si terre soit done per ceux parolz, dedit et concessit ecclesiæ de tiel lieu, le parson et ses successeurs serra inheriter.* And in like manner if a gift be of chattels to parishoners, who are no corporation, it is good and the church wardens shall take them in succession, for the gift is to the use of the church. 37 H. 6. 30.—1 *Kyd. Corp.* 29.

In other cases the law looks to the substance of the gift, and in favor of religion, vest sit in the party capable of taking it. And notwithstanding the doubts of a learned, but singular mind, *Perk.* § 55, in our judgment the grant in the present charter, if there had been a church actually existing in Pawlet at the time of the grant, must, upon the common law have received the same construction. In the intendment of law the parson and his successors would have been the representatives of the church entitled to take the donation of the glebe. It would in effect have been a grant to the parson of the church of England, in the town of Pawlet, and to his successors, of one share in the township, as an endowment to be held *jure ecclesiæ;* for a glebe is emphatically the dowry of the church; *Gleba est terra qua consistit dos ecclesiæ. Lind.* 254.

Under such circumstances, by the common law, the existing parson would have immediately become seized of the freehold of the glebe. as a sole corporation capable of transmitting the inheritance to his successors.

Whether, *during his life*, the fee would be in abeyance according to the ancient doctrine (*Litt.* § 646, 647.—*Co. Lit.* 342. 5 *Edw.* 4, 105.—*Dyer* 74. *pl.* 43.—*Hob.* 338.—*Com. Dig. Abeyance A. Id. Ecclesiastical persons, C.* 9.—*Perk.* § 709.) or whether, according to learned opinions in modern times, the fee should be considered as *quodam modo* vested in the parson for the benefit of his church and his successors, (*Co. Lit.* 341, *a. Com. Dig. Ecclesiast. persons, C.* 9.—*Fearne, cont. rem.* 513, *&c. Christian's note to 2 Black. Com.* 107, *note* 3.—*Gilb. tenures* 113. 1 *Woodeson* 512,) is not very material to to be settled; for at all events the whole fee would have passed out of the crown. *Litt.* § 648.—*Co. Lit.* 341, *a. Christian's note ubi supra. Gilb. tenures* 113. Nor would it be in the power of the crown, after such a grant executed in the parson, to resume it at its pleasure. It would become a perpetual inheritance of the church, not liable, even during a vacancy, to be divested; though by consent of all parties interested, viz: the patron, and ordinary, and also the parson if the church were full, it might be aliened or encumbered. *Litt.* § 648. *Co. Lit.* 343. *Perk.* § 35.—1 *Burn's ecclesiast. law* 585.

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But in as much as there was not any church duly consecrated and established in Pawlet at the time of the charter, it becomes necessary further to enquire whether, at common law, a grant so made, is wholly void for want of a corporation having a capacity to take.

In general no grant can take effect unless there be a sufficient grantee then in existence. This, in the case of corporations, seems pressed yet further; for if there be an aggregate corporation, having a head, as a mayor and commonalty, a grant or devise made to the corporation during the vacancy of the headship is merely void; although for some purposes, as for the choice of a head, the corporation is still considered as having a legal entity, 13 *Ed.* 4, 8. 18 *Ed.* 4, 8, *Bro. Corporation*, 58, 59.—*Dalison, R.* 31.—1 *Kyd. Corp.* 106, 107,—*Perk.* § 33, 50. Whether this doctrine has been applied to parochial churches during an avoidance has not appeared in any authorities that have fallen within our notice; and perhaps can be satisfactorily settled only by a recurrence to analogous principles, which have been applied to the original endowments of such churches.

We have already seen that no parish church, as such, could have a legal existence until consecration; and consecration was expressly inhibited unless upon a suitable endowment of land. The cannon law, following the civil law, required such endowment to be made or at least ascertained, before the building of the church was begun. *Gibs.* 189.—1 *Burn's Eccles. law*, 233. This endowment was in ancient times commonly made by an allotment of *manse and glebe*, by the lord of the manor, who thereupon became the patron of the church. Other persons also at the time of consecration often contributed small portions of ground, which is the reason, we are told, why, in England, in many parishes, the glebe is not only distant from the manor, but lies in remote, divided, parcels, *Ken. Par. Aut*: 222, 223, *cited in* 1 *Burn's, Eccles. law*, 234. The manner of founding the church and making the allotment was for the bishop or his commissioner to set up a cross and set forth the ground where the church was to be built, and it then became the endowment of the church. *Degge. p.* 1, *ch.* 12, *cited* 1 *Burn's, Eccles. law*, 233.

From this brief history of the foundation of parsonages and churches, it is apparent that there could be no spiritual or other corporation capable of receiving livery of seizin of the endowment of the church. There could be no parson, for he could be inducted into office only as a parson of an existing church, and the endowment must precede the establishment thereof. Nor is it even hinted that the land was conveyed in trust, for at this early period trusts were an unknown refinement. The land therefore must have passed out of the donors, if at all, without a grantee, by way of public appropriation or dedication to pious uses. In this respect it would form an exception to the generality of the rule, that to make a grant valid there must be a person *in esse* capable of taking it. And under such circumstances until a parson should be legally inducted to such new church, the fee of its lands would remain in abeyance, or be like the *hæreditas jacens* of the Roman code in expectation of an heir. This would conform exactly to the doctrine of the civil law, which, as to pious donations, Bracton has not scrupled to affirm to be the law of England. *Res vero sacræ, religiosæ, et sanctæ in nullius bonis sunt, quod enim divini juris est, id in nullius hominis bonis est, immo in bonis dei hominum censura, &c. Res quidam nullius dicuntur pluribus modis, &c. Item censura (ut dictum est,) sicut res sacræ religiosæ et sanctæ. Item casu, sicut est hæreditas jacens ante additionem, sed fallit in hoc, quia sustinet vicem personæ defuncti, vel quia speratur futura hæreditas ejus, qui adibit. Bracton, 8, a. Justin. institt. lib. 2, tit. 1.—Co. Lit. 342. on Litt. § 447.*

Nor is this a novel doctrine in the common law. In the familiar case where a man lays out a public street or highway, there is, strictly speaking, no grantee of the easement, but it takes effect by way of grant or dedication to public uses. *Lade v. Shepherd, 2 Str. 1004. Hale in Harg. 78.* So if the parson or a stranger, purchase a bell with his own money and put it up, the property passes from the purchaser, because, when put up, it is consecrated to the church, *11 H. 4, 12, 1 Kyd. Corp. 29, 30.* These principles may seem to savour of the ancient law; but in a modern case in which, in argument, the doctrine was asserted, lord Hardwicke did not deny it, but simply decided that the circumstances of that case did not amount to a donation of the land, on which

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a chappel had been built, to public and pious uses. *Attorney General v. Foley*, 1 *Dick. R.* 363. And in an intermediate period, lord chief justice Dyer held that if the crown by a statute renounced an estate, the title was gone from the crown, although not vested in any other person, but the fee remained in abeyance.

It is true that Weston, *J.* was, in the same case, of a different opinion; but lord chief baron Comyns has quoted Dyer's opinion without any mark of disapprobation. *Com. Dig. Abeyance, A.* 1.

For the reasons then that have been stated, a donation by the crown for the use of a non-existing parish church, may well take effect by the common law as a dedication to pious uses, and the crown would thereupon be deemed the patron of the future benefice when brought into life. And after such a donation it would not be competent for the crown to resume it at its own will, or alien the property without the same consent which is necessary for the alienation of other church property, viz: the consent of the ordinary, and parson, if the church be full, or in a vacancy, of the ordinary alone.

And the same principles would govern the case before the Court if it were to be decided upon the mere footing of the common law. If the charter had been of a township in England, the grant of the glebe would have taken effect as a dedication to the parochial church of England to be established therein.

Before such church were duly erected and consecrated the fee of the glebe would remain in abeyance, or at least be beyond the power of the crown to alien without the ordinary's consent. Upon the erection and consecration of such a church and the regular induction of a parson, such parson and his successors would, by operation of law and without further act, have taken the inheritance *jure ecclesiæ*.

Let us now see how far these principles were applicable to New Hampshire, at the time of issuing of the charter of Pawlet.

New Hampshire was originally erected into a royal

province in the 31st year of Charles 2d, and from thence until the revolution, continued a royal province, under the immediate control and direction of the crown. By the first royal commission granted in 31, Charles 2, among other things judicial powers, in all actions, were granted to the provincial governor and council, "so always "that the form of proceedings in such cases, and the "judgment thereupon to be given, be as consonant and "agreeable to the laws and statutes of this our realm of "England, as the present state and condition of our sub-"jects inhabiting within the limits aforesaid (i. e. of the 'province) and the circumstances of the place will ad-"mit." Independent, however, of such a provision, we take it to be a clear principle that the common law in force at the emigration of our ancestors is deemed the birth right of the colonies unless so far as it is inapplicable to their situation, or repugnant to their other rights and privileges. *A fortiori* the principle applies to a royal province.

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By the same commission or charter the crown granted to the subjects of the province, "that liberty of con-"science shall be allowed to all Protestants, and that "such especially as shall be conformable to the rites of "the church of England shall be particularly countenanc-"ed and encouraged." By a subsequent commission of 15 *Geo.* 2, the governor of the province among other things, is authorized "to collate any person or persons "to any churches, chappels, or other ecclesiastical bene-"fices, within our said province, as often as any shall "happen to be void," and this authority was continued and confirmed in the same terms by royal commissions, *in* 1 *Geo.* 3, *and* 6 *Geo.* 3. By the provincial statute of 13 *Ann, ch.* 43, the respective towns in the province were authorized to choose, settle and maintain their ministers, and to levy taxes for this purpose, so always that no person who constantly and conscientiously attended public worship according to another persuasion should be excused from taxes. And the respective towns were further authorized to build and repair meeting houses, minister's houses and school houses, and to provide and pay school-masters. This is the whole of the provincial and royal legislation upon the subject of religion.

In as much as liberty of conscience was allowed and

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the church of England was not exclusively established, the ecclesiastical rights to tithes, oblations and other dues had no legal existence in the province. Neither, upon the establishment of churches, was a consecration by the bishop, or a presentation of a parson to the ordinary, indispensible; for no bishopric existed within the province.

But the common law so far as it respected the erection of churches of the Episcopal persuasion of England, the right to present, or collate to such churches, and the corporate capacity of the parsons thereof to take in succession, seems to have been fully recognized and adopted. It was applicable to the situation of the province, was avowed in the royal grants and commissions, and explicitly referred to in the appropriation of glebes, in almost all the charters of townships in the province. And it seems to be also clear that it belonged to the crown exclusively, at its own pleasure, to erect the church in each town that should be entitled to take the glebe, and upon such erection to collate, through the governor, a parson to the benefice. The respective towns in their corporate capacity had no control over the glebe; but in as much as they were bound, by the provincial statute, to maintain public worship, and had therefore an interest to be eased of the public burthen, by analogy to the common law in relation to the personal property of the parish church, the glebe could not, before the erection of a church, be aliened by the crown without their consent; nor after the erection of a church and induction of a parson, could the glebe be aliened without the joint consent of the crown as patron, the parson as *persona ecclesiæ*, and the parishoners of the church as having a temporal as well as spiritual interest, and thereby in effect representing the ordinary.

But a mere voluntary society of Episcopalians within a town, unauthorized by the crown, could no more entitle themselves, on account of their religious tenets, to the glebe, than any other society worshiping therein.

The church entitled, must be a church recognized in law for this particular purpose. Whenever therefore, within the province, previous to the revolution, an Episcopal church was duly erected by the crown, in any town,

the parsons thereof regularly inducted had a right to the glebe in perpetual succession. Where no such church was duly erected by the crown, the glebe remained as an *hæreditas jacens*, and the state which succeeded to the rights of the crown, might, with the assent of the town, alien or encumber it; or might erect an Episcopal church therein, and collate, either directly, or through the vote of the town, indirectly, its parson, who would thereby become seized of the glebe *jure ecclesiæ*, and be a corporation capable of transmitting the inheritance.

Such in our judgment are the rights and privileges of the Episcopal churches of New Hampshire, and the legal principles applicable to the glebes reserved in the various townships of that state previous to the revolution. And without an adoption of some of the common law in the manner which I have suggested, it seems very difficult to give full effect to the royal grants and commissions, or to uphold that ecclesiastical policy which the crown had a right to patronize and to which it so explicitly avowed its attachment.

It seems to be tacitly, if not openly, conceded, that before the revolution, no regular Episcopal church was established in Pawlet. By the revolution the state of Vermont succeeded to all the rights of the crown as to the unappropriated as well as appropriated glebes.

It now therefore becomes material to survey the statutes which the state of Vermont has, from time to time, passed on this subject.

By the statute of 26th of October, 1787, the selectmen of the respective towns were authorized during the then *septennary* (which expired in 1792,) to take the care and inspection of the glebes and to lease the same for, and during the same term; and further, to recover possession of the same, where they had been taken possession of by persons without title; but an exception is made in favor of ordained Episcopal ministers, who during their ministry within the same term, were allowed to take the profits of the glebes within their respective towns. The statute of 30th October, 1794, granted to their respective towns the entire property of the glebes, therein situate, *for the sole use and support of religious worship*; and

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authorized the selectmen of the towns to lease and recover possession of such glebes. This act was repealed by the statute of the 5th of November, 1779. But by the statute of the 5th of November, 1805, the glebes were again granted to the respective towns, *for the use of the schools of such towns*; and power was given to the selectmen to sue for possession of, and to lease the same.

By the operation of these statutes, and especially of that of 1794, which, so far as it granted the glebes to the towns, could not afterwards be repealed by the legislature so as to divest the right of the towns under the grant, the towns became respectively entitled to all the glebes situate therein which had not been previously appropriated by the regular and legal erection of an Episcopal church within the particular town; for in such case the towns would legally represent all the parties in interest, viz. the state which might be deemed the patron, and the parish.

Without the authority of the state, however, they could not apply the lands to other uses than public worship; and in this respect the statute of 1805, conferred a new right which the towns might or might not exercise at their own pleasure.

Upon these principles the Plaintiffs are entitled to recover, unless the Defendants shew, not merely that before the year 1794, there was a society of Episcopalians in Pawlet, regularly established according to the rules of that sect, but that such society was erected by the crown, or the state, as an Episcopal church (i. e. the church of England,) established in the town of Pawlet. For unless it have such a legal existence, its parson cannot be entitled to the glebe reserved in the present charter.

The statement of facts is not, in this particular, very exact; but it may be inferred from it that the Episcopal society or church was not established in Pawlet previous to the year 1802. In what manner and by what authority it was then established does not distinctly appear. As the title of the Plaintiffs is however *prima facie* good, and the title of the Defendants is not shown to be sufficient, upon the principles which have been stated the Plaintiffs would seem entitled to judgment.

There is another view of the subject which if any doubt hung over that which has been already suggested would decide the cause in favor of the Plaintiffs. And it is entitled to the more weight because it seems in analagous cases to have received the approbation and sanction of the state Courts of New Hampshire. In the various royal charters of townships in which shares have been reserved for public purposes (and they are numerous) it has been held that the shares for the first settled minister and for the benefit of a school, were vested in the town in its corporate capacity; in the latter case as a fee simple absolute, in the former case as a base fee, determinable upon the settlement of the first minister by the town.

The foundation of this construction is supposed to be that the town is by law obliged to maintain public worship and public schools; and that therefore the legal title ought to pass to the town, which is considered as the real *cestui que* use. By analogy to this reasoning the share for a glebe might be deemed to be vested in the town for the use of an Episcopal church; and then before any such church should be established, and the use executed in its parson, by the joint assent of the legislature and the town, the land might at any time be appropriated to other purposes.

We do not profess to lay any particular stress on this last consideration, because we are entirely satisfied to vest the decision upon the principles which have been before asserted.

On the whole, the opinion of the majority of the Court is, that upon the special statement of facts by the parties, judgment ought to pass for the Plaintiffs.

JOHNSON, *J.* The difficulties in this case appear to me to arise from refining too much upon the legal principles relative to ecclesiastical property under the laws of England.

I find no difficulty in getting a sufficient trustee to sustain the fee until the uses shall arise.

It is not material whether the corporation of Pawlet

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consist of the proprietors or inhabitants. The grant certainly vests the legal interest in the proprietor; and it is in nothing inconsistent with this idea to admit that the corporate powers of the town of Pawlet are vested in the inhabitants. The proprietors may still well be held trustees, but the application of the trust may be subject to the will of the whole combined population.

I therefore construe this grant thus, we vest in you so much territory, by metes and bounds, in trust to divide the same into sixty-eight shares; to assign one share in fee to each of you, the grantees, two to the governor, one to the church of England as by law established, &c. This certainly would be a sufficient conveyance to support the fee for the purposes prescribed.

But the difficulty arises on the meaning of the words "church of England as by law established." This was unquestionably meant to set apart a share of the land granted, for the use of that class of Christians known by the description of Episcopalians. But was it competent for any man, or any number of men to enter upon this land, without any legal designation or organization identifying them to come within the description of persons for whose use this reservation was made? I think not. Some act of the town of Pawlet, or of the legislature of the state, or at least of Episcopal jurisdiction, became necessary to give form and consistency to the *cestui que use*, until such person or body became constituted and recognized. I see nothing to prevent the legislature itself from making an appropriation of this property.

Their controlling power over the corporate body denominated the town of Pawlet, certainly sanctioned such an act; and before the act passed in this case there does not appear to have been in existence a person, or body of men, in which the use could have vested.

I therefore concur in the decision of the Court.